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No. 91-1420

In the
Supreme Court of the United States
October Term, 1991

JOAN GROWE, SECRETARY OF STATE
OF THE STATE OF MINNESOTA, et al.
Appellants,

v.

JAMES EMISON, et al.
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

APPELLEES' SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO DISMISS

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No. 91-1420

In the Supreme Court of the United States

October Term, 1991

Joan Growe, Secretary of State of the State of Minnesota, Patricia Cotlow, Phillip Krass, Sharon LaComb, James Stein, and Theodore Suss, individually and on behalf of all citizens of Minnesota similarly situated; Patrick O'Connor, Hennepin County Auditor, individually and on behalf of all County Auditors of the State of Minnesota; the Seventy-seventh Minnesota State House of Representatives; and the Seventy-seventh Minnesota State Senate,

Appellants,

vs.

James Emison, Judy Fairbanks, Marie Iverson, Ken Dean, Steve Castillo, Lew Freeman, and Yao Lo, individually and on behalf of all Citizen and Voters of the State of Minnesota similarly situated; Duane Benson, Terry Dempsey, Delores Hettig, Richard Harmon, David E. Peterson, E.M. Patricia Pidcock, and Frank Ringsmuth; and Mark Lundgren, Carver County Auditor, individually and on behalf of all County Auditors of the State of Minnesota,

Appellees.

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APPELLEES' SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO DISMISS

Pursuant to Supreme Court Rule 18.9, appellees submit this supplemental brief to address the arguments raised in Appellants' Response to Appellees' Motion to Dismiss ("Appellants' Response"). Appellants' Response constitutes an "intervening matter not available at the time of [appellees'] last filing." *Cf.* Supreme Court R. 18.9. For the reasons stated below and in the original Motion to Dismiss, appellees request that this Court dismiss appellants' Jurisdictional Statement and this appeal.

ARGUMENT

I. THE FEDERAL COURT FULLY ADHERED TO THE PRINCIPLES OF *SCOTT V. GERMANO,* WHILE THE STATE COURT IMPROPERLY FAILED TO DEFER TO THE LEGISLATURE TO PROVIDE IT WITH AN ADEQUATE OPPORTUNITY TO CONDUCT REDISTRICTING.

Contrary to appellants' assertion, the "clear and simple opinion" in *Scott v. Germano,* 381 U.S. 407, 409 (1965), does not indicate that federal courts should universally defer to state court actions. *Cf.* Appellants' Response at 2. Rather, this Court clearly held in *Germano* that a federal court must initially defer to state efforts to adopt redistricting plans but may thereafter act when the state fails to adopt valid plans in a timely fashion. *See Germano,* 381 U.S. at 409-10. In so acting, the federal court may enter such orders as the court deems appropriate. *See id.* at 409.

As appellees have noted, the federal court here took action only after the legislative process had failed to validly redistrict by late January 1992. *See* Appellees' Motion to Dismiss Appellants' Jurisdictional Statement ("Appellees' Motion") at 7. The federal court in deciding to act considered the likely delay from appeal of any state court action through the state appellate process and to this Court and noted the adverse effects of that delay on 1992 elections. *See id.* Further, the federal court acted only after finding that the legislative redistricting plan issued by the state court perpetuated Voting Rights Act violations. *See id.* at 7-8. As such, the federal court acted fully within its authority under *Germano* in taking action to conduct redistricting where the state efforts at redistricting had failed to produce a *valid* plan in a *timely* manner. *See Germano,* 381 U.S. at 409-10.

The state court's actions were not so reasonable. In issuing a legislative redistricting plan without giving the legislative process adequate opportunity to conduct redistricting, the state court violated this Court's

instruction that "reapportionment is primarily a matter for legislative consideration and determination, and . . . judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites after having had an adequate opportunity to do so." *See White v. Weiser,* 412 U.S. 783, 794-95 (1973) (citation omitted). The state court's issuance of a legislative plan less than one month before the legislature's scheduled session threatened to unduly influence the legislative process that the decision in *Weiser* had sought to protect.

Appellants suggest that the state court's premature action is nevertheless acceptable where the legislative process was not *expected* to produce any result. *See* Appellants' Response at 3. Appellants offer no authority for this remarkable assertion that a state court is free to act when it presumes that the legislative process will not produce a valid redistricting law. *Cf. id.* This unsupported argument most assuredly does not reflect the type of deference required by *Weiser,* 412 U.S. at 794-95, or *Germano,* 381 U.S. at 409-10.

To the contrary, appellants' argument suggests that the state court could itself assess the likelihood of enactment of a plan through the legislative process and that the court could thereupon make its own decision on whether to defer.[1] There is no authority for such a judicial power.

The state's legislative process must *first* be given an adequate opportunity to act. *See Weiser,* 412 U.S. at 794-95. Where the state's efforts fail to produce valid plans in a timely fashion, a federal court may properly conduct redistricting. *See Germano,* 381 U.S. at 409-10.

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[1] Appellants' argument also implies that a stated intent to veto legislation can be equated *before* the fact as a presumptive veto. Were that the case, Chapter 246 would have been invalidated long ago, as originally intended by the Governor.

II. THE STATE COURT'S LEGISLATIVE REDISTRICTING PLAN WAS NOT ENTITLED TO PRECLUSIVE EFFECT IN THE FEDERAL ACTION.

Despite appellants' suggestion that the state court's legislative redistricting plan was offered in the federal court action, that plan was never in fact offered as a preclusive judgment under the Full Faith and Credit Act, 28 U.S.C. § 1738.[2] *Cf.* Appellants' Response at 5. As such, under the same Act, the state court's decision was not entitled to preclusive effect. *See* 28 U.S.C. § 1738.

In any event, appellants fail to address the fact that the federal court's decision is a valid second judgment. As appellees indicated in their Motion to Dismiss, where a second judgment inconsistent with the first is reached, the second judgment prevails "whether the *res judicata* effects of the first judgment were ignored by the parties or expressly rejected by the court in a second action." 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4404 at 26 (citing authorities), *cited in* Appellees' Motion at 10-11. The federal court's judgment is therefore entitled to effect, without regard to whether the first judgment was addressed by the federal court. *See id.*

III. THE FEDERAL COURT'S FINDINGS OF VOTING RIGHTS ACT VIOLATIONS WERE NOT "CLEARLY ERRONEOUS."

The federal court was presented with Voting Rights Act claims pled by the parties before it. *See* Emison Complaint, App. at A-82-88. As such, the federal court was obligated to address those issues. Likewise, the federal court had an affirmative obligation to remedy violations that it found,

[2] In addition, appellants in their response imply that they provided the state court's judgment to the federal court in early December. *Cf.* Appellants' Response at 5. In actuality, appellants merely noted the state court's action in the context of a motion asking the federal court to reconsider a stay. That motion was not brought until late January 1992.

and appropriate relief was expressly sought by the Emison and Benson appellees. *See id.*, App. at A-88-91; Benson Complaint, Supp. App. at SA-75-76.

Regardless of any state court determinations or stipulations of *some* parties on the validity or invalidity of either the 1982 districts or Chapter 246, relief for Voting Rights Act violations was available from the federal court, and those issues were therefore not moot.[3] *See* 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3533 at 212 (1984, supp. 1991). The federal court therefore addressed the Voting Rights Act issues, assessed the evidence, and issued its order finding that Minnesota's existing district schemes and the appellant legislature's and state court's plans perpetuated Voting Rights Act violations by diluting minority voting rights. *See* February 19 Order, App. at A-38-39; Order Denying Stay, Supp. App. at SA-61; Appellees' Motion at 13-19.

Contrary to appellants' view, it is not appellees' responsibility to "prop up" the federal court's well-reasoned finding of Voting Rights Act violations. *Cf.* Appellants' Response at 8. Rather, it is *appellants'* burden to show that the federal court's decision was "clearly erroneous." *See* Fed. R. Civ. P. 52(a). Appellants have failed to meet this strict standard.

Appellants in their Jurisdictional Statement do not argue that the federal court's findings of Voting Rights Act violations were incorrect. Instead, appellants maintain only that the federal court did not have sufficient evidence to support its findings. *See* Jurisdictional Statement at 18-20. Nevertheless, appellants ignore the federal court's thorough examination of the Senate's "totality of circumstances" factors, as well as the federal court's concise conclusion that:

[3] Appellants in raising what essentially is their mootness argument also note that Chapter 246 contained a provision repealing the laws that established the 1982 legislative districts. *Cf.* Appellants' Response at 6 n.4, 8 n.6. As it was part of Chapter 246, however, the repealer provision itself was invalidated when Chapter 246 was declared unconstitutional. The 1982 districts were thereafter once again in effect.

> the all-white senate delegation from Minneapolis, the significant proportional underrepresentation of minorities from the overall legislative delegation from Minneapolis, the apparent attempt to protect incumbencies at the expense of minority concentrations, the fragmentation of a geographically cohesive minority population into different senate districts, the educational disadvantage of Minneapolis minorities, the segregation in the Minneapolis school districts, and the judicial experience showing the need for super-majority minority districts, when considered altogether, are sufficient to create a *prima facie* case in the totality of the circumstances which exists here.

February 19 Order, App. at A-38.

By failing to show that the federal court's analysis of the evidence or its conclusion are "clearly erroneous," appellants have failed to meet the applicable standard of review. It is not sufficient to merely suggest that the federal court, after studying extensive evidence of Voting Rights Act violations, failed to consider sufficient evidence. It is not enough to argue that appellees somehow have the responsibility to "prop up" the federal court's order. Appellants have an affirmative obligation to show that the federal court's order was clearly in error. They have failed to do so, and the order is therefore entitled to affirmance.

IV. THE FEDERAL COURT RESPECTED THE STATE POLICY THAT IT COULD DISCERN, AND ITS PLANS ARE THEREFORE FULLY IN ACCORD WITH *WEISER* AND *UPHAM.*

The federal court was not bound by *Weiser,* 412 U.S. 783, or *Upham v. Seamon,* 456 U.S. 37 (1982) to follow Chapter 246, Chapter 246 as the legislature proposed to amend it, or Chapter 246 as adopted by the state court. *See* Appellees' Motion at 22-27. As was clearly stated by this Court in *Weiser,* "the District Court should defer to state policy in fashioning relief *only where that policy is*

consistent with constitutional norms and is not itself vulnerable to legal challenge." Weiser, 412 U.S. at 797 (emphasis added).

Chapter 246 had been found by both the state and the federal court to be unconstitutional due to numerous defects. The federal court recognized that Chapter 246 contained at least 160 errors in more than 30 state senate and house districts covering approximately one-third of the state's 87 counties. *See* February 19 Order, App. at A-52 n.50. In addition, the federal court itself found that Senate File 1596, intended by the legislature to "correct" the extensive defects of Chapter 246, was not entitled to deference as "state policy" after the Governor's veto of that bill. *See id.* at A-43. Finally, the federal court found that Chapter 246 and the proposed amendments in Senate Filed 1596 (which together constituted appellant legislature's proposed legislative redistricting plan), as well as the state court's own plan based on Chapter 246, perpetuated violations of the Voting Rights Act. *See id.,* App. at A-38-39.

In light of these findings, *Weiser* virtually mandates that the federal court *not* give deference to these various proposals. Chapter 246, Chapter 246 as it was proposed to be "corrected," and Chapter 246 as adopted by the state court were all "vulnerable to legal challenge," as is reflected by the federal court's findings of statutory and constitutional violations. *Cf. Weiser,* 412 U.S. at 797.

Furthermore, the federal court, again contrary to appellants' representations, specifically found that "the plan proposed by [appellant legislature] and adopted by the state court is not only gerrymandered to protect incumbents in Minneapolis, foretelling the continued dilution of minority voting rights, but it also contains unwarranted population deviations and lacks compactness statewide." *Cf.* Order Denying Stay, Supp. App. at SA-61 *with* Appellants' Response at 12 n.12. Given these violations, as well as the extended deficiencies in Chapter 246, the federal court was not obligated to defer to that chapter, to that chapter as proposed to be amended, or to

the state court's adoption of a plan based on that chapter.

Appellants continue to characterize the necessary corrections to Chapter 246 as merely "technical." Nevertheless, excessive population deviations, noncontiguous districts, overlapping districts, indecipherable descriptions, and minority voting rights violations do not constitute "technicalities."[4]

Appellants also continue to imply that the corrections to Chapter 246 must necessarily be those found in Senate File 1596. *See, e.g.,* Appellants' Response at 8-9. Each of the 160 defects in Chapter 246 could be corrected in any number of ways, however, and no state policy exists to indicate how the legislative process may have corrected those defects, since Senate File 1596 was vetoed by the Governor. *Cf.* February 19 Order, App. at A-43. Each of the dozens of necessary corrections therefore involved the state court's or the parties' guess at the legislative intent behind Chapter 246, a hastily-drafted law. Such a result is not the intent of the deference requirement in *Weiser,* 412 U.S. at 794-95, and the federal court therefore acted properly in not deferring to appellants' supposed "state policy."

V. THE FEDERAL COURT'S CONGRESSIONAL REDISTRICTING PLAN SHOULD BE AFFIRMED.

Appellants maintain that the only delay in the state court's issuance of a congressional plan was caused by the federal court's temporary stay of the state court. *See* Appellants' Response at 13. Appellants fail to note, however, that the state court during the period of this stay took actions necessary to formulate its own congressional

[4] Appellants also continue to add complication and confusion to this proceeding by making assertions outside the record. For example, appellants suggest that the federal court's plan will "certainly" have description errors if transcribed from map to written form. *See* Appellants' Response at 11 n.10. There is no evidence of this, nor could there be, and there is additionally no support for any proposition that the federal court's maps must even be reduced to writing.

plan, including the scheduling of plan submissions and of hearings required for that court's promulgation of a plan. Appellants' perception of the source of this delay is therefore inaccurate.

Appellants' argument that Senate File 1597 constitutes valid evidence of state policy is also incorrect. *Cf. id.* Senate File 1597 does *not* constitute state policy, a determination reached by *both* courts in this matter. *See Cotlow v. Growe,* C8-91-985, Procedural Order No. 7 (Minn. Spec. Redis. Panel, March 3, 1992), App. at A-445-446 n.1; February 19 Order, App. at A-53. Appellants' suggestion that Senate File 1597 is state policy is therefore not only inaccurate, but it is also directly contrary to findings of the very court upon which appellants seek to rely.

CONCLUSION

For the above reasons and for the reasons contained in Appellees' Motion to Dismiss Appellants' Jurisdictional Statement, appellees hereby request that this Court dismiss appellants' Jurisdictional Statement and this appeal.

Dated: March 25, 1992

Respectfully submitted,

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